

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TOM HARDISTY,

06-CV-1670-BR

Plaintiff,

OPINION AND ORDER

v.

MICHAEL J. ASTRUE,
Commissioner, Social Security
Administration,

Defendant.

TIM WILBORN
Wilborn Law Office, PC
19093 S. Beaver Creek Road
PMB #314
Oregon City, OR 97045
(503) 632-1120

Attorney for Plaintiff

KAREN J. IMMERGUT
United States Attorney
BRITANNIA I. HOBBS
Assistant United States Attorney
1000 S.W. Third Avenue
Suite 600
Portland, OR 97204-2902
(503) 727-1053

DAVID MORADO

Regional Chief Counsel

KATHRYN A. MILLER

Special Assistant United States Attorney

Social Security Administration

701 Fifth Avenue

Suite 2900 M/S 901

Seattle, WA 98104-7075

(206) 615-2531

Attorneys for Defendant

BROWN, Judge.

On November 17, 2006, Plaintiff filed a Complaint in this Court in which she sought judicial review of a final decision of the Commissioner of the Social Security Commission denying Plaintiff's application for supplemental security income payments (SSI) under Title XVI of the Social Security Act.

On November 29, 2007, this Court issued an Opinion and Order reversing the Commissioner's decision and remanding the matter for further proceedings pursuant to sentence four of 42 U.S.C. § 405(g). On that same day, the Court entered a Judgment reversing and remanding this matter to the Commissioner.

On March 31, 2008, Plaintiff filed an Application for attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, in the amount of \$8,866.12. On August 29, 2008, the Court entered an Order denying Plaintiff's Application for EAJA fees. On October 27, 2008, Plaintiff appealed the Court's denial of EAJA fees to the Ninth Circuit.

On December 23, 2008, Plaintiff filed an Unopposed Motion for Attorney Fees pursuant to 42 U.S.C. § 406(b) in which he sought \$7,230.75 in attorneys' fees for work performed in this matter before this Court.

On January 5, 2008, the Court issued an Order directing Plaintiff's counsel to file a supplemental statement to support the Motion for Attorney Fees by setting out the amount of the award in this case. Plaintiff did so, and on March 17, 2009, the Court granted Plaintiff's Motion for Attorney Fees pursuant to 42 U.S.C. § 406(b). The Court also directed Plaintiff's counsel to refund to Plaintiff the EAJA fees in the amount of \$8,866.12 if Plaintiff's counsel was awarded those fees by the Ninth Circuit.

On March 19, 2009, Plaintiff filed a Motion to Alter or Amend the Court's March 17, 2009, Opinion and Order on the ground that, as the Court noted in its March 17, 2009, Opinion and Order, an attorney who receives fees for the same work under the EAJA and § 406(b) must refund the *smaller* fee to the plaintiff. See 99 Stat. 183, 186 (1985)(emphasis added). In this case, the smaller fee would be the \$7,230.75 the Court awarded counsel pursuant to § 406(b).

Accordingly, the Court grants Plaintiff's Motion to Alter or Amend and amends its March 17, 2009, Opinion and Order to require Plaintiff's counsel to refund to Plaintiff the smaller fee of \$7,230.75 awarded to Plaintiff pursuant to § 406(b) if the Ninth

Circuit awards counsel more than that amount in fees under the EAJA.

CONCLUSION

For these reasons, the Court **GRANTS** Plaintiff's Unopposed Motion to Amend/Correct Order on Motion for Attorney Fees (#42) and amends its March 17, 2009, Opinion and Order as set forth herein.

IT IS SO ORDERED.

DATED this 20th day of May, 2009.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge
